UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

NEW ENGLAND PHOENIX CO., INC., Plaintiff,	:	
v.	:	CA 03-107S
PETER D. SAHAGEN, Defendant.	:	

REPORT AND RECOMMENDATION

David L. Martin, United States Magistrate Judge

Before the court is the Motion to Dismiss of Defendant Peter D. Sahagen ("Defendant") for failure to state a claim upon which relief can be granted. See Fed. R. Civ. P. 12(b)(6). This matter has been referred to me for preliminary review, findings, and recommended disposition pursuant to 28 U.S.C. § 636(b)(1)(B) and D.R.I. Local R. 32(a). A hearing was conducted on January 7, 2004. After listening to oral argument, reviewing the memoranda and exhibits submitted, and performing independent research, I recommend that the Motion to Dismiss be denied.

Facts and Travel

This is an action to recover judgment against the maker of a secured demand note (the "Note"). On August 18, 1989, Defendant executed the Note in favor of Bank of New England, Old Colony, N.A. (the "Bank"),[1] in the amount of $280.000.00. See Complaint ¶ 5; id., Exhibit ("Ex.") A (Note). The Note provided for the payment of interest on a monthly basis. See id., Ex. A. Payment of the Note was secured by an open end mortgage (the

[1] Bank of New England, Old Colony, N.A. (the "Bank") subsequently closed, and the Federal Deposit Insurance Corp. ("FDIC") became its receiver. See Complaint at 2 n.1. The FDIC assigned the Note to NAB Asset Venture II, L.P. ("NAB"). See id. Plaintiff is the successor-in-interest to NAB. See id. ¶ 1.

"Mortgage") on certain real estate located in Westerly, Rhode Island (the "Property"). See Complaint ¶ 6; id., Ex. B (Mortgage).

By a letter dated June 13, 1994, demand for payment of the Note was made to Defendant. See Complaint ¶ 8. The demand sought payment in full of the principal balance of the Note plus accrued interest. See id., Ex. C. (Letter from Spero to Defendant of 6/13/94). Defendant failed to pay, and the Property was sold at foreclosure on August 31, 1994, for the amount of $54,000.00. See Complaint ¶ 9.

On March 21, 2003, Plaintiff filed its Complaint. There was some difficulty serving Defendant, see Ex Parte Motion to Extend Time for Service of Process, but he ultimately responded on November 5, 2003, by filing the instant Motion to Dismiss, see Motion to Dismiss. Plaintiff's Opposition to Defendant's Motion to Dismiss for Failure to State a Claim was filed on November 21, 2003. After the hearing conducted on January 7, 2004, the court took the matter under advisement.

Standard of Review

In ruling on a motion to dismiss pursuant to Rule 12(b)(6), the court construes the complaint in the light most favorable to the plaintiff, see Paradis v. Aetna Cas. & Sur. Co., 796 F.Supp. 59, 61 (D.R.I. 1992); Greater Providence MRI Ltd. P'ship v. Med. Imaging Network of S. New England, Inc., 32 F.Supp.2d 491, 493 (D.R.I. 1998), taking all well-pleaded allegations as true and giving the plaintiff the benefit of all reasonable inferences, see Arruda v. Sears, Roebuck & Co., 310 F.3d 13, 18 (1st Cir. 2002); Carreiro v. Rhodes Gill & Co., 68 F.3d 1443, 1446 (1st Cir. 1995); Negron-Gaztambide v. Hernandez-Torres, 35 F.3d 25, 27 (1st Cir. 1994). If under any theory the allegations are sufficient to state a cause of action in accordance with the law, the motion to dismiss must be denied. See Hart v. Mazur, 903

F.Supp. 277, 279 (D.R.I. 1995). The court "should not grant the motion unless it appears to a certainty that the plaintiff would be unable to recover under any set of facts." Roma Constr. Co. v. aRusso, 96 F.3d 566, 569 (1st Cir. 1996); accord Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957); see also Arruda v. Sears, Roebuck & Co., 310 F.3d at 18 ("[W]e will affirm a Rule 12(b)(6) dismissal only if 'the factual averments do not justify recovery on some theory adumbrated in the complaint.'").

Discussion

In support of the Motion to Dismiss, Defendant argues that this action is barred by the statute of limitations and also by the doctrine of laches. See Memorandum of Law in Support of Defendant's Motion to Dismiss for Failure to State a Claim ("Defendant's Mem.") at 1.

Statute of Limitations

The parties agree that the statute of limitations for bringing an action upon a demand note is ten years. See Defendant's Mem. at 4; Memorandum of Law in Support of Plaintiff's Opposition to Defendant's Motion to Dismiss for Failure to State a Claim ("Plaintiff's Mem.") at 6; see also R.I. Gen. Laws § 9-1-13(a) (1997 Reenactment) ("Except as otherwise specially provided, all civil actions shall be commenced within ten (10) years next after the cause of action shall accrue, and not after."). The parties differ as to when Plaintiff's cause of action accrued. Defendant maintains that it accrued on the date the Note was executed, August 18, 1989, see Defendant's Mem. at 4, while Plaintiff contends that the cause of action did not accrue until demand for payment was made on June 13, 1994,[2] see

[2] Plaintiff also argues that application of the proceeds from the foreclosure sale which occurred on August 31, 1994, to Defendant's debt restarted a new statute of limitations from that date forward. See Memorandum of Law in Support of Plaintiff's

Plaintiff's Mem. at 7. If Defendant is correct, this action is time barred as the Complaint should have been brought by August 18, 1999. If Plaintiff is correct, the action is timely.

The Rhode Island Supreme Court addressed the question of when the statute of limitations starts to run relative to a demand note in the case of DiBattista v. Butera, 244 A.2d 857 (R.I. 1968):

> The general rule is that a promissory demand note is payable immediately, and no demand is necessary to start the running of the statute of limitations. See 71 A.L.R.2d 284, 290, and cases cited therein. However, **this general rule may not apply where there is something on the paper or in the circumstances under which it is given showing that an actual demand or delay for payment was contemplated by the parties before the statute of limitations would start to run**. See Id., at 309. In the latter cases, the demand being an integral part of a cause of action, or a condition precedent to the right to sue, the statute does not begin to run until a demand is made. See Foreman v. Graham (Tex.Civ.App.), 363 S.W.2d 371, 372.

DiBattista v. Butera, 244 A.2d at 859 (bold added).

This court finds that here the exception to the general rule applies. The Note and the Mortgage were executed as part of the same transaction. They bear the same dates, see Complaint, Ex. A, B, and the Mortgage specifically refers to the Note, see id., Ex. B. Accordingly, the two documents must be read together. See FDIC v. Consol. Mortgage & Fin. Corp., 805 F.2d 14, 17 n.3 (1st Cir. 1986)("[A] lease and promissory note are to be read together as instruments executed as a part of the same transaction for purposes of determining when the note was

---

Opposition to Defendant's Motion to Dismiss for Failure to State a Claim ("Plaintiff's Mem.") at 4-6 (relying primarily upon Innocente v. Guisti, 43 A.2d 700 (R.I. 1945)). The court discusses this additional argument infra at 7-9 and concludes that the continuing validity of the holding in Innocente v. Guisti is dubious.

intended to come due.")(citing Ligran, Inc. v. Medlawtel, Inc., 86 N.J. 583, 432 A.2d 502 (N.J. 1981)). When so read, the documents indicate that the parties contemplated that some period of time would elapse before repayment of the loan was required and that there would be an actual demand for repayment. First, the Mortgage requires the borrower to pay "**when due** the principal of and the interest on the indebtedness evidenced by the Note ...." Complaint, Ex. B ¶ 1 (bold added). Second, the Note provides for an acceleration in the rate of interest "**from the date of demand** ...." See id., Ex. A (bold added). Third, the Note permits extensions of the time of payment in the discretion of the holder of the Note.[3] See id. Such an extension provision necessarily contemplates that a demand for payment be made in order for there to be an extension of the time for payment.

Defendant focuses on language in the Note that the borrower "waives presentment, demand, protest and notices of every kind ...,"[4] id.; see Reply Memorandum of Law in Further Support of Defendant's Motion to Dismiss for Failure to State a Claim ("Defendant's Reply Mem.") at 2-3, as support for his contention that the exception to the general rule "exists where a demand

---

[3] The extension provision of the Note appears below:

> Every one of the undersigned and every indorser or guarantor of this note regardless of the time, order or place of signing waives presentment, demand, protest and notices of every kind and **assents to any one or more extensions or postponements of the time of payment** or any other indulgences, to any substitutions, exchanges or releases of collateral if at any time there be available to the holder collateral for this note, and to the additions or releases of any other parties or persons primarily or secondarily liable.

Complaint, Ex. A.

[4] The sentence containing this language is set forth in n.3 above.

note *expressly requires* a formal demand before it can become payable," id. at 2, and that by virtue of this waiver no demand for payment is required to start the running of the statute of limitations, see id. at 2-3. The court is not persuaded. The waiver provision must be read in the context of the entire sentence and the other provisions of the Note and Mortgage. That context weighs heavily against Defendant's interpretation.

The court agrees with Plaintiff that accepting Defendant's argument would require the court to find that the Note was literally due to be paid on day one, the day the Note was executed, and that the borrower was in default on that very day, having waived any notice from the holder that it was due and payable. See Plaintiff's Mem. at 6. Such an interpretation is unreasonable.

In short, this court finds that the circumstances under which the Note was given and the language of the Note and the Mortgage indicate that the parties contemplated there would be an actual demand before repayment of the loan was required. Therefore, the exception to the general rule applies. See DiBattista v. Butera, 244 A.2d at 859. The statute of limitations did not commence to run until on or about June 13, 1994, the date of the letter demanding payment of the Note. Accordingly, this action is not time barred, and Defendant's contention that it must be dismissed on that basis should be rejected.[5]

---

[5] At oral argument the court asked the parties to address the question of whether the statute of limitations contained in R.I. General Laws § 6A-3-118(b) (2001 Reenactment) was applicable to the present action. That statute provides that if a demand for payment is made to the maker of a demand note, an action to enforce the obligation of a party to pay the note must be commenced within six years after the demand. See id. Defendant's counsel responded that the statute constituted an additional ground for finding that the action was barred. See

Having determined that the action is timely, it is unnecessary to discuss at length Plaintiff's additional argument

---

Tape of 1/7/04 Hearing. Plaintiff's counsel disputed that the statute was applicable because it was part of the Uniform Commercial Code ("UCC") and the Note here was not part of a commercial loan. See id. Plaintiff's counsel advised that the description of the Note in the Complaint as "a commercial demand promissory note" was an error. See id.

The court need not decide whether the statute of limitations contained in § 6A-3-118(b) is limited to commercial transactions or whether the loan made by the Bank to Defendant is subject to the UCC. Application of § 6A-3-118(b) to the present action is barred by the principle that a reduction in the statute of limitations will not be given retroactive effect where such application would completely cut off or seriously reduce the period in which the aggrieved party might file an action. See In re Apex Express Corp., 190 F.3d 624, 642 (4th Cir. 1999)("'A newly enacted statute that shortens the applicable statute of limitations may not be applied retroactively to bar a plaintiff's claim that might otherwise be brought under the old statutory scheme because to do so would be manifestly unjust.'")(quoting Chenault v. U.S. Postal Serv., 37 F.3d 535, 539 (9th Cir. 1994)); Smith v. Firestone Tire & Rubber Co., 675 F.Supp. 1134, 1137 (C.D. Ill. 1988)("Illinois courts consider retroactive application on a case-by-case basis to determine whether the plaintiff had a reasonable time to file suit between the effective date of the new statute and the date on which the pre-existing cause of action would be barred.")(internal quotation marks omitted).

R.I. General Laws § 6A-3-118(b) became effective on July 1, 2001. See P.L. 2000, ch. 238, § 3; P.L. 2000, ch. 421, § 3. The demand for payment of the Note was made on June 13, 1994. See Complaint ¶ 8. Retroactive application of § 6A-3-118(b) would mean that Plaintiff's right to bring suit was extinguished on the day the statute became effective. Such a result is not permissible. See In re Apex Express Corp., 190 F.3d at 642; Smith v. Firestone Tire & Rubber Co., 675 F.Supp. at 1137; see also Carpenter v. Florida Cent. Credit Union, 369 So.2d 935, 936 (Fla. 1979)(holding that legislature may shorten statutes of limitations and they may be made retroactive "so long as a reasonable time to file suit is provided those with existing causes of action."); cf. Sarasota-Coolidge Equities II, L.L.C. v. S. Rotondi & Sons, Inc., 770 A.2d 1264, 1265-66 (N.J. Super. Ct. App. Div. 2001)(declining to apply retroactively a change in the statute of limitations affecting the rights of the maker and holder of a promissory note).

that the statute of limitations to recover a post-foreclosure deficiency runs from the date the deficiency is created. See Plaintiff's Mem. at 4-6 (citing Innoncente v. Guisti, 43 A.2d 700, 703-04[6] (R.I. 1945)(holding that application of the proceeds from the sale of mortgaged real estate constitutes a payment by the debtors and an acknowledgment by them of the existence of the debt, such that the statute of limitations commences anew)).

Defendant argues that the holding in Innoncente is a dated aberration, see Defendant's Reply Mem. at 3-4, which is at variance with a significant body of modern case and statutory law, see id. at 4 n.6, which either rejects the notion that foreclosure constitutes acknowledgment of the debt which renews the statute of limitations, see id. (citing N.J. Stat. Ann. § 2A:50-1 (2003); Life Sav. Bank v. Wilhelm, 100 Cal. Rptr. 2d 657, 659 (Cal. Ct. App. 2000); Lennar Northeast Partners Ltd. P'Ship v. Gifaldi, 695 N.Y.S.2d 448, 450 (N.Y. App. Div. 1999); Int'l Collection Servs., Inc. v. Bailey, No. 01-A-019702-CH-00072, 1997 WL 278042, at *2 (Tenn. Ct. App. May 28, 1997); Bank of Oklahoma, N.A. v. Welco, Inc., 898 P.2d 172, 177 (Okla. Ct. App. 1995); Commonwealth Bank & Trust Co., N.A. v. Hemsley, 577 A.2d 627, 630-31 (Pa. Super. Ct. 1990)), or requires that post-foreclosure deficiency actions be brought within relatively short periods of time (ranging from three months to two years), see id. (citing Mass. Gen. Laws ch. 244, §17A (2003); Bank of Papillion v. Nguyen, 567 N.W.2d 166, 170 (Neb. 1997); First Citizens Bank & Trust Co. v. Martin, 261 S.E.2d 145, 147 (N.C. Ct. App. 1979)). Defendant asserts that Rhode Island "courts have long since abandoned the legal fiction articulated in Inno[n]cente – namely, that a judgment of foreclosure constitutes an 'acknowledgment' of debt." Id. at 4; see also id. at 4-5 (citing Giorgio v. DeFusco, 862 F.2d 933, 938 (1st Cir. 1988)("For an acknowledgment to toll

[6] Pinpoint citation by the court.

a statute of limitations, the debtor must acknowledge the debt in such a way that one can infer a promise or willingness to discharge an obligation.")(citing Rodriguez v. Santos, 466 A.2d 306, 309-10[7] (R.I. 1983)).

The court shares Defendant's view that the continuing validity of the Innoncente opinion, which was written in 1945, is highly questionable. Two justices of the Rhode Island Supreme Court dissented from the decision, see Innoncente v. Guisti, 43 A.2d at 704-05, and the dissent written by Justice Moss (with which Chief Justice Flynn concurred) is not easily dismissed. The majority's rationale that the application of the proceeds of the sale of the mortgaged property somehow constitutes an acknowledgment of the debt by the debtors such that the statute of limitations should commence to run anew, see id. at 702-04, strikes this court as strained. The better rule clearly would be to require such post foreclosure deficiency actions to be brought within a reasonably prompt period of time following the foreclosure when evidence pertaining to both the foreclosure and the amount of the debt unpaid is still relatively fresh and easily obtainable.

Nevertheless, as the court has found that this action is not barred because of the exception to the general rule set forth in DiBattista v. Butera, 244 A.2d at 859, the court's misgivings regarding the Innoncente holding do not affect the resolution of the instant motion. Accordingly, the court proceeds to Defendant's next ground for dismissal, laches.

Laches

Defendant devotes only a paragraph to this ground in his memorandum, see Defendant's Mem. at 5, and does not articulate any real argument regarding it other than to assert it as an

[7] Pinpoint citation by the court.

alternative ground for dismissal. In his reply memorandum Defendant asserts in a footnote, without elaboration, that Plaintiff's "inexcusable delay has, at a bare minimum, led to the erosion of evidence relating to that demand as well as to the alleged foreclosure in 1994 of a mortgage made in conjunction with the Demand Note," Defendant's Reply Mem. at 5 n.7. However, Defendant does not state what specific evidence has been eroded or how his defense to this action may have been prejudiced as a result. See Edelmann v. Chase Manhattan Bank, 861 F.2d 1291, 1293 n.9 (1st Cir. 1988)("Laches requires a showing of prejudice"); Puerto Rican-American Ins. Co. v. Benjamin Shipping Co., 829 F.2d 281, 284 (1st Cir. 1987)(stating that "[t]he second element of laches is prejudice as a result of the delay.").

Additionally, the parties have not had the opportunity to conduct discovery. The court believes that it is premature to consider dismissal based on the doctrine of laches. See Sherman v. Standard Rate Data Serv. Co., 709 F.Supp. 1433, 1441 (N.D. Ill. 1989)("[L]aches is a factual question which generally is not subject to resolution at the summary judgment stage let alone at the pleadings stage."); Karleen v. New York Univ., 464 F.Supp. 704, 708 (S.D.N.Y. 1979)(finding question of whether action barred by doctrine of laches to be premature and stating that "[t]he defense of laches is an affirmative defense under Fed.R.Civ.P. 8(c) and properly should be raised in the defendant's answer and not upon a motion to dismiss"). Accordingly, Defendant's request that this action be deemed barred by the doctrine of laches should be rejected.

Conclusion

For the reasons stated above, I recommend that Defendant's Motion to Dismiss for failure to state a claim upon which relief can be granted be denied. Any objections to this Report and Recommendation must be specific and must be filed with the Clerk of Court within ten (10) days of its receipt. See Fed R. Civ. P.

72(b); D.R.I. Local R. 32. Failure to file specific objections in a timely manner constitutes waiver of the right to review by the district court and of the right to appeal the district court's decision. See United States v. Valencia-Copete, 792 F.2d 4, 6 (1st Cir. 1986); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

David L. Martin
United States Magistrate Judge
January 14, 2004